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In The

Supreme Court of the United States

October Term, 1974

No.———

PAUL GILBERT ALLRED, AUBREY L. DAVIS, JR. and IRIS BLUE LEWIS,

Petitioners

v

STATE OF NORTH CAROLINA,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF NORTH CAROLINA

The petitioners, Paul Gilbert Allred, Aubrey L. Davis, Jr., and Iris Blue Lewis, pray that a writ of certiorari issue to review the judgment of the North Carolina Court of Appeals, entered April 17, 1974, affirming petitioners' conviction by the Superior Court of New Hanover County, which judgment the Supreme Court of North Carolina refused to review by its judgment entered June 4, 1974, dismissing petitioners' appeal and denying their petition for writ of certiorari. The State contends that this petition should be denied.

OPINION BELOW

The opinion of the Court of Appeals of North Carolina and the judgment of the Supreme Court of North Carolina have not yet been reported. Both the opinion and the judgment are appended to the petitioners' writ.

JURISDICTION

The judgments of the Superior Court of New Hanover

County convicting petitioners Paul Gilbert Allred, Aubrey L. Davis, Jr., and Iris Blue Lewis of the crime of violation of the emergency proclamation in violation of North Carolina General Statute 14-288.12 and sentencing each of them to serve a term of thirty (30) days in the New Hanover County Jail, suspended for two years upon the payment of a fine of $25.00, were entered on August 17, 1972. Petitioners' relief in the North Carolina courts was exhausted when their conviction was affirmed by the North Carolina Court of Appeals on April 17, 1974, and when the Supreme Court of North Carolina on June 4, 1974, dismissed their appeal and denied their petition for certiorari. The jurisdiction of this Court is invoked under 28 U.S.C.A. sec. 1257 (3).

QUESTIONS PRESENTED

I. Were the petitioners' rights under the First and Fourteenth Amendments of the Constitution of the United States violated by the issuance of an emergency proclamation.

II. Were the petitioners' basic rights under the First and Fourteenth Amendments to the United States Constitution violated by the refusal of the trial judge to allow counsel for petitioners to present evidence relevant to petitioners' state of mind or to argue that in a case where First Amendment freedoms are at stake, the State must prove that petitioners' behavior was willful and motivated by criminal intent or state of mind?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitution of the United States:

Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or bridging the freedom of speech or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Amendment XIV.

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

General Statutes of North Carolina:

N.C.G.S. 14-288.1 (10)

Definitions.—Unless the context clearly requires otherwise, the definitions in this section apply throughout this article:

(10) "State of emergency": The condition that exists whenever, during times of public crisis, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent.

N.C.G.S. 14-288.12

(a) The governing body of any municipality may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency.

(b) The ordinances authorized by this section may permit prohibitions and restrictions:

(1) Of movements of people in public places;

(2) Of the operation of offices, business establishments, and other places to or from which people may travel or at which they may congregate;

(3) Upon the possession, transportation, sale, purchase, and consumption of intoxicating liquors;

(4) Upon the possession, transportation, sale, purchase, storage, and use of dangerous weapons and substances, and gasoline; and

(5) Upon other activities or conditions the control of which may be reasonably necessary to maintain order and protect lives or property during the state of emergency.

The ordinances may delegate to the mayor of the municipality the authority to determine and proclaim the existence of a state of emergency, and to impose those authorized prohibitions and restrictions appropriate at a particular time.

(c) This section is intended to supplement and confirm the powers conferred by §§160-52, 160-200 (7), and all other general and local laws authorizing municipalities to enact ordinances for the protection of the public health and safety in times of riot or other grave civil disturbance or emergency.

(d) Any ordinance of a type authorized by this section promulgated prior to June 19, 1969 shall, if otherwise valid, continue in full force and effect without reenactment.

(e) Any person who violates any provision of an ordinance or a proclamation enacted or proclaimed under the authority of this section is guilty of a misdemeanor punishable as provided in §14-4. (1969)

ARGUMENT

1. *The petitioners' rights under the First and Fourteenth Amendments to the Constitution were not violated by the issuance of the emergency proclamation.*

A brief history of the facts and circumstances surrounding the issuance of the emergency proclamation is necessary for an understanding of the cause for which certiorari is being sought.

During the Fall of 1971, the City of Wilmington, North Carolina was wrought with turmoil and strife which was attributable to a large degree to racial problems. This "turmoil and strife" included incidents where buildings were burned, businesses looted, and innocent people assaulted and victimized by snipers.

It was during this time that the Rights of White People Association (hereinafter ROWP) was holding meetings and encouraging its members and those who sympathized with their cause to arm themselves and organize armed patrols to bring the "race war" under control. Most of ROWP's public meetings were held in Hugh MacRae Park—a public park in New Hanover County which adjoined the City of Wilmington. Prior to November 11, 1971, ROWP mobs with guns had marched to the home of a school official with whom they had a grievance and to the home of a plant foreman who had fired a ROWP member. Armed members of ROWP had stopped persons going through MacRae Park while meetings were being held in the picnic area of the park.

On the night of November 11, 1971, ROWP held a public meeting in the park. A ROWP leader—a petitioner here—spoke. He advocated and requested that those present bring guns and ammunition to the next meeting in the park at 7:00 P.M. the next day. He told the gathering he would then send them out on armed patrol. The sheriff tape recorded the meeting.

Just prior to ROWP's November 12 meeting—at approximately 5:00 P.M. on the 12th of November—local officials met to discuss the situation. They were concerned and feared that, in view of the conditions of strife and turmoil in the City, the scheduled meeting of ROWP—where the public was invited, and where it was contemplated that people would bring guns and ammunition for the purpose of going out on armed patrols—would ultimately result in violent confrontation and civil disorder. They decided to issue an emergency proclamation—based on the finding that a state of emergency existed and

they were statutorily empowered, if not obligated, to act—which prohibited the use of county parks by the public between the hours of 7:00 P.M. and 7:00 A.M. and similarly prohibited the transportation of guns and ammunition. A deputy was immediately dispatched to the park where ROWP was to meet and he read the proclamation to approximately 100 persons at about 6:40 P.M. The crowd disbursed. The proclamation was distributed to all communication media in the City and county.

Two days later, on Sunday, November 14, a crowd again gathered at Hugh MacRae Park. At about 6:40 P.M., an officer of the law read the proclamation over a bullhorn—warning people that they would be arrested if they did not leave by 7:00 P.M. Most people left. The petitioners refused to leave. They were arrested in Hugh MacRae Park after 7:00 P.M. on November 14th and charged with the violation of the proclamation. They stated that they were aware of the proclamation prohibiting use of the park and that they deliberately remained in the park because they felt that no state of emergency existed and that their First Amendment Constitutional rights were being infringed.

The petitioners were convicted of violating the duly issued emergency proclamation and their convictions were affirmed on appeal. The North Carolina Supreme Court denied certiorari when the petitioners sought further appellate review.

In seeking certiorari here, the petitioners contend that their rights under the First and Fourteenth Amendments to the Constitution of the United States were violated by the issuance of the emergency proclamation. The bases for this contention are a mixed bag. Petitioners assert that the proclamation was obviously directed against them and that they were therefore entitled to notice and opportunity to be heard before any such proclamation issued. They also assert that no clear and present danger existed—either at the time of the issuance of the proclamation or at the time of their arrest—which could justify the interference with their constitutional right of assembly. In

short, the petitioners contend that the emergency proclamation was both procedurally deficient (that is to say, affected parties—particularly ROWP—did not have prior notice of it and a chance to be heard) and substantively unnecessary (i.e., there was no "clear and present danger" so there was no need for any emergency proclamation).

The State contends that it is somewhat illogical to argue that emergency legislative powers can be exercised only after all affected parties are given notice of the planned action and on opportunity to be heard. Petitioners make the argument that the proclamation was issued in a manner which was procedurally infirm. They rely on cases where *judicially* imposed *ex parte* orders have been determined to have been unconstitutional as prior restraints on the exercise of constitutionally protected rights because the party restrained was not notified of the order or given an opportunity to be heard before the order was made effective. The State contends that the situation in the case at bar is readily distinguishable from cases such as *Carroll v President and Commissioners of Princess Anne*, 393 U.S. 175, 21 L. Ed. 2d 325, 89 S.Ct. 347 (1968), or *Anderson v Dean*, 354 F. Supp. 639 (N.D.Ga. 1973) or *Organization For A Better Austin v Keefe*, 402 U.S. 415, 29 L.Ed.2d 1, 91 S.Ct. 1575 (1971) or *Lynch v Snepp*, 350 F.Supp. 1134 (W.D.N.C. 1972)—all of which dealt with *ex parte* prior restraints imposed by the judiciary in the form of an injunction and not the emergency legislative power possessed by local officials. The "due process" that goes into the process of legislating is necessarily different from the due process that inheres to an adversarial proceeding.

Under the laws of the State—and consistent with the law of the land—local officials are empowered to legislate during a "state of emergency". When State officials perceive that a state of emergency exists where lives and property are imminently endangered, they have the power—if not the duty—to take remedial steps to avoid the threatened harm. The State does not contend that there is no due process during a state of

emergency—it does contend simply that local officials may enact ordinances designed to permit the imposition of prohibitions and restrictions during a state of emergency without notice to affected parties and without giving affected parties a chance to be heard before the ordinance is made effective. The State contends that this conclusion is logically compelled from the very nature of an emergency situation. Legal authority abounds to support this proposition. See, e.g., *State v Dobbins*, 277 N.C. 404, 178 S.E.2d 449 (1971); *United States v Chalk*, 441 F.2d 1277 (4th Cir. 1971); *Carroll v President and Commissioners of Princess Anne*, 393 U.S. 175, 21 L.Ed. 2d 325, 89 S.Ct. 347 (1968). Without this power, the State is virtually impotent to deal with bona fide states of emergency.

It is for these reasons that the State contends that the procedural basis for the petitioners' argument is without merit. The sole issue is really whether the local officials acted reasonably in determining that a state of emergency existed and in issuing the proclamation that they issued (which necessarily had an incidental effect on the constitutional rights of the petitioners). The issue—in other words—is whether the proclamation can be reasonably regarded as having been necessary and proper to preserve order and save property and, more importantly, save lives.

Prior restraints on constitutional rights in any form are, of course, abhorrent to our free society. They are to be utilized with caution. But they do have a place in the structure of our law. *Carroll v President and Commissioners of Princess Anne, supra*, at p 180. They are necessary where a genuine state of emergency exists and they are proper when reasonably calculated to avoid the threatened harm in a manner most consistent with the free and full exercise of constitutional rights.

The facts indicate that local officials in New Hanover County were confronted with a situation where a group of citizens were planning to "take the law into their own hands". Distraught by the unlawful acts presumably occurring daily in the black community, these citizens—led by ROWP—were

ready, willing and able to go out on armed citizen patrols to quell the disturbances themselves. Local officials reasonably believed that they had but a short time to act before these veritable vigilantes sprung into action.

Did this constitute a "state of emergency"? Were these New Hanover County officials reasonable in believing that a state of emergency existed? The North Carolina General Statutes say that a state of emergency is

> "the condition that exists whenever, during times of public crises, disaster, rioting, catastrophe, or similar public emergency, public safety authorities are unable to maintain public order or afford adequate protection for lives or property, or whenever the occurrence of any such condition is imminent". N.C.G.S. 14-288.1 (10).

The State contends that under the standards established by the law and by the courts, it is clear that local officials acted reasonably in determining that a state of emergency did in fact exist. Local officials were confronted with one crisis (the turmoil and strife in Wilmington) on top of another (citizens were endeavoring to do something about the turmoil and strife themselves—armed citizen patrols were in the works). Vigilantism, in essence, is a civil disorder which threatens the very existence of the State. As such, it is within the police power of the State to control. C.F. *United States v Chalk*, 441 F.2d 1277 (4th Cir. 1971). Local officials in New Hanover County had to act to preserve the public order.

The next question that arises is whether the local officials acted in a manner which was designed to alleviate the threatened harm but at the same time did not require a wholesale forfeiture of constitutional rights. In short, was the proclamation as unobtrusive as the state of emergency would allow?

The State contends that the action of these local officials was not only permissible but commendable. Their emergency legislation was couched in terms that were designed to accomplish the objective of maintaining public order without unduly

sacrificing constitutional rights. Indeed, the petitioners raise no question about the scope or breadth of the emergency legislation. They argue only that the proclamation was not warranted because no state of emergency in fact existed.

In light of the foregoing, it is clear that the petitioners' rights under the First and Fourteenth Amendments to the United States Constitution were not violated by the issuance of the emergency proclamation.

II. *The petitioners' rights under the First and Fourteenth Amendments to the United States Constitution were not violated by the refusal of the trial judge to allow counsel to present evidence relevant to petitioners' state of mind or to argue that in a case where First Amendment Freedoms are at stake, the State must prove that petitioners' behavior was willful and motivated by criminal intent or state of mind.*

Petitioners make the novel argument that their rights were violated by the trial judge who refused to hear any evidence which might have explained what the petitioners were doing in the park in violation of the emergency proclamation. In view of the factual findings—based on the petitioners' own admissions—that at the time they were arrested they knew of the proclamation forbidding the use of the park between certain hours and that they deliberately remained in the park because they felt that no state of emergency in fact existed and that their rights were being denied, it is not surprising that the trial judge refused to allow any other evidence relevant to petitioners' "state of mind". The facts showed clearly that the petitioners were not going to make the argument that they were ignorant of the emergency proclamation or that they were where they were because they were looking for a stray dog or because they were lost or anything of the kind. The petitioners admittedly intentionally violated the law. Rarely is there a case where "criminal intent" is so clearly established. As a very simple matter, the petitioners "willfully" violated the law because they thought the law was wrong. This was established

at trial and affirmed on appeal. For this reason, the petitioners' analogies are not persuasive.

CONCLUSION

For the reasons articulated herein, it is respectfully submitted that the petitioners' writ for certiorari should be denied.

Respectfully submitted,

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